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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether judgment of trebled damages for attempting to monopolize a market which cannot constitute a relevant market under the federal U.S. antitrust laws may be sustained solely on the basis of a Ninth Circuit rule which interprets Section 2 of the Sherman Act in a manner conflicting with decisions of this Court and the law in every other circuit.

2. Whether liability for attempted monopoly may be imposed without any showing of dangerous probability of successful monopolization of a relevant market and thus, without any showing that a defendant's conduct had a detrimental impact on competition, thereby transforming Sherman Act Section 2 into a statute generally regulating all manner of business practices without regard to their impact on competition.

3. Whether certiorari should be granted to resolve the conflict between all other Courts of Appeal and the anomalous Ninth Circuit rule, which is the subject of great confusion even among different panels of the Ninth Circuit, and which has resulted in extensive and unnecessary litigation in that Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Mobil Oil Corporation ("Mobil") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit dated December 13, 1983, Appendix A hereto.

This decision sustained a trial court judgment awarding trebled antitrust damages for attempted monopoly of a market which could not, as a matter of law, constitute a relevant market for antitrust purposes. Thus, if Mobil had succeeded in the alleged "attempt," no liability for monopolization could have resulted. The trial court judgment was upheld solely on the basis of a unique Ninth Circuit rule which eliminates a dangerous probability of success as an element of a Sherman Act Section 2 attempted monopoly claim, an element required by the decisions of this Court. As would be expected, this Ninth Circuit rule conflicts with the law in every other circuit, causing unnecessary and

confusing litigation in the Ninth Circuit. This confusion is compounded by an intracircuit conflict between the various panels of the Ninth Circuit as to the interpretation and application of this unique rule.

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court below are those named in the caption of the case in this Court.*

OPINION BELOW

The opinion of the Court below is reported at 721 F.2d 1207 and is reprinted as Appendix A.

JURISDICTION

The decision of the Court of Appeals was entered on December 13, 1983. A timely petition for rehearing with suggestion for rehearing en banc was denied by order of February 21, 1984. By order of the Court of Appeals dated March 9, 1984, mandate was stayed until the filing of this petition for writ of certiorari.

This petition for certiorari is filed under Sectior. 2101 of Title 28 of the United States Code within 90 days of denial of Mobil's petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the district court was based upon 15 U.S.C. § 15.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. §1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Petitioner is a wholly owned subsidiary of Mobil Corporation. See Appendix B for affiliate and subsidiary corporations of petitioner and Mobil Corporation.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Respondents Blanton and Healey are former operators of Mobil service stations in Seattle. They sued Mobil alleging a number of violations of federal antitrust laws. After trial, the jury, by special verdict, found that Mobil engaged in an unlawful tying arrangement by coercing Blanton and Healey to purchase oil, lubricants and TBA&S (tires, batteries, accessories and specialty items) from Mobil C.R. 273, Blanton, 1(b), Healey, 1(b). The jury also found, with regard to Blanton only, that Mobil coerced resale price maintenance in the last quarter of 1974, and

engaged in an illegal boycott by persuading Mobil dealers not to buy Mobil products from Blanton. With respect to each of these specific antitrust violations the jury found that the respondents sustained "$0" damage. C.R. 273, Blanton, 1(c), 2(b), 3(b); Healey, 1(c).

Mobil was also found liable for attempting to monopolize sales to Mobil dealers. The jury special verdict form spelled out precisely the product market which the jury believed Mobil had attempted to monopolize. Ironically, the jury found that, while there was a product market consisting of the sale of *all* automotive products (*i.e.*, all competing brands) to *all* the different dealers in the relevant geographic area, Mobil had *not* monopolized or attempted to monopolize that market C.R. 273, Blanton 4(b) and Healey 2(b). Under the decisional law of this Court, it is clear that this is the *only* market broad enough under the circumstances of this case to qualify as a "relevant market" under the Sherman Act.

However, the jury found that a relevant market or submarket existed "for the sale of Mobil-branded and non-Mobil-branded oil, lubricants and TBA&S to Mobil dealers," and that Mobil did attempt to monopolize this "relevant market or submarket." C.R. 273, Blanton 4(d) and Healey 2(d). The trial court gave the case to the jury on the theory—mandated by the decisions of this Court—that:

> "An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market." Jury Instruction No. 30, C.R. 268.

As noted above, the jury found with respect to each of the specific antitrust violations (*e.g.*, tying arrangement, group boycott) that the damages respondents sustained were "$0." Yet, on the attempted monopoly claims, the jury awarded damages of $134,585.00 to Blanton and $19,967.00 to Healey. C.R., Blanton, 4(f), Healey, 2(f).

Mobil appealed, pointing out that sales to Mobil dealers could not, as a matter of law, constitute a relevant market for antitrust purposes. The Ninth Circuit did not dispute that the market upon which the jury had based its verdict had no relevance under the Sherman Act. The panel, however, through the expedient of the doctrine in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964), simply declared relevant market irrelevant:

> "We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability."
>
> Opinion, Appendix A-12.

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[1]In so finding, the panel rejected Mobil's contention that since the case was given to the jury on a relevant market theory and because the attempted monopoly portion of the jury verdict was based on a finding that Mobil attempted to monopolize a "relevant market or submarket . . . for the sale of Mobil-branded and non-Mobil-branded oil, lubricants, and TBA&S to Mobil dealers," respondents were precluded from raising the *Lessig* issue at the appellate level. [Appellant's Combined Reply Brief and Answering Brief, pp. 9-11; Opinion, Appendix A-12 to A-14].

The irony of this holding cannot go unnoticed. Liability under Section 1 of the Sherman Act requires a causal connection between the alleged antitrust conduct and the damages claimed. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Such strict causality requirements are here swept aside by holding that a *"per se"* violation causing "$0" damage makes out a Sherman 2 claim by eliminating the requirement of a dangerous probability of monopolization of a "relevant market." Under this analysis, every Section 1 violation would necessarily violate Section 2 of the Sherman Act. Clearly, Congress intended no such result.

Even under the decisional law of the Ninth Circuit relevant market for antitrust purposes cannot be defined as consisting only of sales of fungible automotive products to Mobil dealers.

> "The standard test of the product market is that it comprises those 'commodities reasonably interchangeable by consumers for the same purpose.' *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395; 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956)."
>
> *JBL Enterprises, Inc. v. Jhirmack Enterprises Inc.*, 698 F.2d 1011, 1016 (9th Cir. 1983) *cert. denied*, ... U.S. ....., 104 S.Ct. 106, 78 L.Ed.2d 109 (1983).

As stated in *South End Oil v. Texaco, Inc.*, 237 F.Supp. 650, 656 (N.D. Ill. 1965)[2]:

> "Where [motor oil] products are competitive and reasonably interchangeable, the relevant market cannot be confined to the products of one manufacturer."

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[2]Cited as authority for the trial court relevant market holding in *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 509 F.Supp. 357, 367 (N.D. Calif. 1981) *aff'd* 698 F.2d 1011 (9th Cir. 1983).

Accord: Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 118 (3rd Cir. 1980); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 296 (7th Cir. 1974). The burden of establishing a relevant submarket rested on the respondent dealers. *Gough v. Rossmoor Corp.*, 585 F.2d 381, 385 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). The nature of the product market precludes any such showing. Oils, lubricants, tires, batteries, and accessories distributed by Mobil simply are not "so unique or so dominant" that any action by Mobil to increase control over its products "virtually assures that competition will be destroyed." *Bushie v. Stenocord*, 460 F.2d 116, 121 (9th Cir. 1972).

REASONS FOR GRANTING THE WRIT

In this case, for the first time, a final judgment awarding treble damages for attempted monopoly is being sustained on appeal solely on the basis of *Lessig v. Tidewater*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Solely on the basis of *Lessig*, Mobil is being held liable for attempting to monopolize sales of oil, lubricants, and automotive products to Mobil dealers, even though sales to such dealers are not, even under the law of the Ninth Circuit, a "relevant market" capable of being monopolized. In sum, *Lessig* rejects this Court's consistent requirement of a "dangerous probability" of success in achieving monopoly power in a relevant market. The dangerous probability element is, of course, what assures that Section 2 will be used to protect "competition" and not "competitors". *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

For 20 years, notwithstanding its rejection by every other circuit in the United States, *Lessig* has been employed—rather unpredictably—to avoid defense judgments in cases lacking any proof of the defendant's position in a relevant market. In the instant case, the jury has spoken, and the danger long implicit in *Lessig*—liability without injury to competition—has occurred. It is therefore now appropriate to determine whether antitrust liability can or should attach for attempting that which, if accomplished, would not violate the antitrust laws.

Numerous grounds require an evaluation, upon certiorari, of the impact of the *Lessig* rule as applied in the Ninth Circuit. *Lessig,* as applied in this case, imposed liability for an attempt to monopolize without reference to any properly defined antitrust relevant market; and, thus, without any showing of adverse effect on competition. Such a result might be appropriate under an "unfair business practices" statute, but is improper under a law designed to prevent a competitor from acquiring monopoly power to set prices and exclude competition. *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 391, 176 S.Ct. 994, 100 L.Ed. 1264 (1956).

Second, *Lessig* allows imposition of damages for attempting to monopolize something which cannot, as a matter of law, constitute a relevant market susceptible of monopolization if the "attempt" had been successful. This unjust result is repugnant to the basic concept that liability for an attempt should only be imposed where succeeding would itself be illegal.

Third, the Ninth Circuit rule is in conflict with the law in every other U.S. circuit. The conduct of business is thus

subject to two vastly dissimilar applications of the same law, depending merely on geographic location.

Finally, under *Lessig,* liability is unpredictable because of its uneven application by the various panels of the Ninth Circuit. This lack of clarity, together with the basic irrationality of the *Lessig* doctrine, has caused much unnecessary litigation and attendant squandering of judicial resources. For all of these reasons, it is appropriate and important for this Court to examine the *Lessig* rule upon writ of certiorari.

I

IMPOSITION OF LIABILITY FOR ATTEMPTED MONOPOLY WITHOUT SHOWING OF DANGEROUS PROBABILITY OF MONOPOLY POWER DISREGARDS THE DECISIONS OF THIS COURT

The Ninth Circuit panel sustained an antitrust jury verdict based on a jury finding that Mobil attempted to monopolize a "relevant market or submarket" consisting of the sale of "Mobil-branded and non-Mobil-branded oil lubricants and TBA&S to Mobil dealers." Mobil appealed, pointing out that this "relevant market or submarket" could not, as a matter of law, constitute a relevant market for antitrust purposes. Under the law of the Ninth Circuit, a market limited to sales to dealers of a particular manufacturer is not a relevant market for antitrust purposes. *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.,* 698 F.2d 1011 (9th Cir. 1983) *cert. denied,* ..... U.S. ....., 104 S.Ct. 106, 78 L.Ed.2d 109 (1983). Relying on the *Lessig* rule, however, the Ninth Circuit panel hearing this case refused to address the relevant market issue stating:

"We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability."

Opinion, Appendix A-12.

Beginning with *Swift and Company v. United States,* 196 U.S. 375, 396 (1905), this Court has repeatedly held that dangerous probability of monopoly power is a necessary element of proof in an attempted monopoly claim. *Lorain Journal Co. v. United States,* 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *United States v. Griffith,* 334 U.S. 100, 105-106, 68 S.Ct. 941, 92 L.Ed. 236 (1948); *American Tobacco Co. v. United States,* 328 U.S. 781, 785, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). The logic for this requirement is obvious:

"To establish monopolization or attempt to monopolize a part of trade or commerce under Section 2 of the Sherman Act, it [is] necessary to appraise the exclusionary power . . . in terms of the relevant market where the product is involved. Without a definition of that market there is no way to measure . . . ability to lessen or destroy competition."

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965).

Clearly, a relevant market for antitrust purposes cannot be limited to sales of branded and non-branded products by a single manufacturer-distributor to its dealers.[3] Rather,

[3]The Ninth Circuit criticized Mobil for failing to distinguish between "Mobil-branded and brokered" and "Mobil-branded or non-Mobil-branded" products. See panel Opinion, Appendix A-10, n. 4. The distinction suggested makes no difference for relevant market purposes under the *du Pont* doctrine of functional interchangeability.

the relevant market must be defined to include sales of all interchangeable products to similarly situated dealers with whom the Mobil dealers compete. Here, that market must be defined to include all sales of oil, lubricants, and TBA&S to all service station dealers with whom respondents competed—the very market which the jury expressly found in the present case that Mobil neither monopolized nor attempted to monopolize. C.R. 273, Blanton 4(b); Healey 2(b).

The fundamental purpose of the antitrust laws is to protect competition, not competitors. *Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 487, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). The undeniable fact in this case is that the automotive products distributed by Mobil are, to the consumer, interchangeable with the products of Mobil's competitors. Respondents did not therefore seriously attempt to establish a relevant submarket as was their burden. *Gough v. Rossmoor Corp., supra,* 585 F.2d at 385. Nor did respondents suggest that if Mobil monopolized the distribution of its automotive products, it would be able to "control prices or to exclude competition." *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). The converse is too obvious to seriously dispute. If Mobil dealers were required by Mobil's alleged predatory conduct to price their Mobil branded/distributed products at too high a price, the consuming public would simply purchase comparable products of other suppliers available at other, non-Mobil service stations. Thus, control by Mobil of prices at Mobil service stations

(through monopolization of wholesale sales) simply could not damage competition in a manner cognizable under federal antitrust laws.

II

THE COURT OF APPEALS UNJUSTLY IMPOSED LIABILITY FOR ATTEMPTING TO MONOPOLIZE A "MARKET" WHICH CANNOT BE MONOPOLIZED

It is the well-established law of the Ninth Circuit that monopoly power in a relevant market must be demonstrated to establish a claim of actual monopolization. *E.g., Greyhound Computer Corp. v. IBM,* 559 F.2d 488, 493 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). To construe the attempt provision wholly without regard to the monopolization that is its asserted objective, and to view the attempt violation in isolation from such monopolization, divorces the concept of attempted monopolization from its statutory language and historical context. *See, National Society of Professional Engineers v. United States,* 435 U.S. 679, 688, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 498-500, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); *Standard Oil Co. v. United States,* 221 U.S. 1, 50-51, 59, 61, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *see also, e.g.,* 21 Cong. Rec. 3149, 3151-3152 (1890). *See also,* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 Michigan L.Rev. 373, 433-434 (1974); Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine,* 58 Cornell L.Rev. 1121, 1125 & n. 19 (1973).

In reliance on this well-established principle, several courts in other circuits have expressly rejected *Lessig. See,*

e.g., Unibrand Tire & Product Co. v. Armstrong Rubber Co., 429 F.Supp. 470, 476-477 (W.D.N.Y. 1977); *see also, infra* p. 14, n. 5. As noted by one court:

> "It would defy all logic to find on the one hand that there is a dangerous probability of monopolization by Chrysler, and, on the other hand, to find that the market which is threatened is not the relevant market and hence not susceptible to unlawful monopolization. *See American Football League v. National Football League,* 205 F.Supp. 60, 65 (D.Md. 1962), *aff'd.,* 323 F.2d 124 (4th Cir. 1963). Clearly, one can threaten to monopolize only that which is capable of being monopolized, and only the relevant market is capable of being monopolized. Accordingly, contrary to plaintiff's contention, the relevant market is a basic issue in a case charging an attempt to monopolize."
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> *Merit Motors, Inc. v. Chrysler Corp.,* 417 F.Supp. 263, 270 (D.C.D.C. 1976), *aff'd,* 569 F.2d 666 (D.C. Cir. 1977), footnote omitted.

Here, through the jury's special finding, we know the injustice foreseen in *Merit Motors* has materialized. Mobil, through the panel's reliance on *Lessig,* has been held liable for attempting to monopolize a market "not susceptible to unlawful monopolization." This unsupportable and manifestly unjust result was only possible because, *contrary to the decisions of this Court and law of all the other circuits, Lessig instructs that for an attempt claim relevant market is "not in issue."*

III

THE LESSIG RULE SHOULD BE ABOLISHED TO ELIMINATE THE CONFLICTS BETWEEN THE NINTH CIRCUIT AND ALL OTHER COURTS OF APPEAL

In the twenty years since the *Lessig* rule eliminated the element of dangerous probability of successful monopolization, every other circuit in the United States has reaffirmed that a showing of dangerous probability is essential to establish an attempted monopoly claim.[4] Numerous circuits have expressly declined to follow *Lessig*,[5] and criticism of

[4]*See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1096 (3d Cir. 1978); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982); *United States v. Empire Gas Co.*, 537 F.2d 296, 298-299 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed. 572 (1977); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 306 (10th Cir. 1975), *cert. denied*, 425 U.S. 907, 96 S.Ct. 1501, 47 L.Ed.2d 758 (1976); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 269 (D.D.C. 1976), *aff'd on other grounds*, 569 F.2d 666 (D.C. Cir. 1977).

[5]*See, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-712 (7th Cir. 1979), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed. 601 (1980); *Spectrofuge Corp. v. Beckman Instruments, Inc., supra*, 575 F.2d at 276 and n.69 (5th Cir.); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *E. J. Delaney Corp. v. Bonne Bell, Inc., supra*, 525 F.2d at 305 (10th Cir.); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., supra*, 508 F.2d at 550 (1st Cir.); *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 287 (8th Cir.), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973).

cases which have been extensive.[6] The conflict between the Ninth Circuit interpretation of Section 2 of the Sherman Act and the interpretation of all other circuits is alone ample ground for issuance of a writ of certiorari in this matter. *Monsanto Company v. Spray Rite Service Corp.*, ... U.S. ....., 41 Antitrust Trade Reg. Rep. (BNA) 603 (1984).

[6]*See* ABA Section of Antitrust Law, *Antitrust Civil Jury Instructions* 112-114, 118-119 (1980); 3 Areeda & Turner, *Antitrust Law* ¶ 820, at 312, ¶ 831, at 335-336, ¶ 832, at 336-339, ¶ 835a, at 346 (1978); 3 Devitt & Blackmar, *Federal Jury Practice and Instructions* §§ 90.24, 9029 (3d ed. 1977); Hampton, Hibner, & Varner, *Horizontal Restraints of Trade—The Sherman Act* § 1.63-1.64, in Hills, *Antitrust Adviser* (2d ed. 1978); 3 von Kalinowski, *Antitrust Laws and Trade Regulation* §§ 9.01[1], 9.01 [2] (1981); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich.. L.Rev. 373, 375, 384-385, 419 (1974); Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U.Pa.L.Rev. 125, 125-126, 128-129, 154 n.114, 196, 170 (1980); Hawk, *Attempts to Monopolize—Specific Intent As Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1122, 1135, 1150 & n.138 (1973).

IV

THE LESSIG DOCTRINE'S CONVERSION OF SECTION 2 OF THE SHERMAN ACT INTO A GENERAL BUSINESS REGULATION STATUTE WITHOUT REGARD TO EFFECTS OF PROHIBITED BEHAVIOR UPON COMPETITION IS A MISAPPLICATION OF THE ANTITRUST LAWS OF THE UNITED STATES

Although, as discussed below, the history of *Lessig* has not been without its vicissitudes, the rule has been repeatedly employed in the past 20 years in a variety of contexts, though never as the sole basis for affirming a final antitrust judgment.[7] The Ninth Circuit's insistence on adherence to some form of the rule, even in the face of extensive and outspoken criticism by the other circuits and many commentators, suggests that *Lessig* rests on some

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[7]For example, in two of the Ninth Circuit cases which since *Lessig* have affirmed final antitrust judgments of attempted monopoly, a proper relevant antitrust market was found to exist. In *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), *cert. denied* 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982) the attempt judgment was affirmed (without reference to *Lessig*) because:

> "Sportservice's conduct, as evidenced by this record, was sufficient for a conclusion that such conduct formed the basis for a substantial restraint of trade, was clearly exclusionary, and *clearly threatening to competition in the relevant concession-franchise market.*"
>
> 676 F.2d at 1309, emphasis added.

The proper definition of that relevant market had been the subject of an earlier appellate decision, 512 F.2d 1264 (1975).

In another attempt case affirming plaintiff's final judgment, *Pacific Coast Agr. Export Assn. v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975) *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976), the jury specifically found specific intent to monopolize a relevant market, and monopoly power. 546 F.2d at 1205. The attempt claim was discussed without mention of *Lessig*.

unarticulated policy deemed important by some (but less than all) panels of the Ninth Circuit.

The unstated assumption implicit in the *Lessig* doctrine seems to be that the Sherman Act ought to be a refuge for all complaints of unfair conduct by manufacturers toward their dealers, or between competitors in general—irrespective of whether the *public interest* in the benefits of competition is threatened by that conduct. Thus, the doctrine punishes, as an "attempted monopoly", any business misconduct that seems "predatory;" *per se* violations often being the catalyst for invoking the *Lessig* rule. While it is true that *per se* violations are deemed inherently anticompetitive, there are, of course, well established measures of damages (trebled) to punish such conduct. The danger of assigning additional significance to *per se* conduct is demonstrated in this case. Here—even assuming that the jury did not mean what it said when it found that these specific acts caused "$0" damages—the trial record clearly demonstrates that the "attempt" damages awarded far exceed the specific damages which respondents claimed. For example, the total amount of price-fixing damages claimed by Blanton was $5,937.02 [Trial Exhibit 286] and the total amount of overcharge on all allegedly tied goods actually purchased from Mobil by Blanton was only $3,109.20 [Trial Exhibit 285]. The total figure of tying damages claimed by Healey based on products actually purchased from Mobil was only $3,365.00 [Trial Exhibit 277]. Clearly these damages fall far short of the jury's catch-all award, and demonstrate the absence of any proof of causation. Such "highly speculative" damages are improper and constitute a separate ground for reversal. *Associated General Contractors of California v. California*

State Council of Carpenters, ... U.S. ....., 103 S.Ct. 897, ... L.Ed. ..... (1983).

As this case clearly demonstrates, *Lessig* strips the attempted monopoly doctrine of its *antitrust* objectives and converts it, in essence, into but another "unfair business practices" statute. This broad interpretation of Sherman Act Section 2 goes far beyond those articulated by this Court or any other court outside the Ninth Circuit. *See, Hunt v. Crumboch,* 325 U.S. 821 (1945), 65 S.Ct. 1545, 89 L.Ed. 1954; *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 483, 497-500, 60 S.Ct. 982, 84 L.Ed. 1311 (1940).

Indeed, there is absolutely no reason to undertake this statutory re-construction, because the "attempted monopoly" conduct which *Lessig* seeks to punish is addressed by laws already in place. These include, first and foremost, specific antitrust law prohibitions against tying arrangements, group boycotts and the other *"per se"* conduct (with attendant treble damages). In addition, there exists the whole panoply of state and federal legislation which protects businesses such as those of respondents.[8]

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[8]As an example, in its opinion here, the panel held Washington's Franchise Investment Protection Act, Wash. Rev. Code § 19.100.010 *et seq.*, to be applicable to these dealers' relationship with Mobil. Washington also has a Consumer Protection Act, RCW § 19.86 *et seq.*, which is broadly applied to cover a variety of commercial wrongs. *Anhold v. Daniels,* 94 Wash.2d 40, 614 P.2d 184 (1980). Moreover, Washington courts (as is true in most if not all the other states) have long recognized the tort of interference with business relationships, which also has broad application. *Calbom v. Knudtzon,* 65 Wash.2d 157, 396 P.2d 148, 151 (Wash. 1964); *Cherberg v. Peoples Nat. Bank of Washington,* 564 P.2d 1137, 1142 (1977).

Whatever rationale might once have existed to support the *Lessig* rule has long since vanished. Today, *Lessig* stands out in irreconcilable contradiction to the concepts underlying the federal antitrust laws. Neither this Court, nor any other court in the United States, has placed such an interpretation on the prohibition of attempted monopoly. Indeed, in light of the product interchangeability doctrine enunciated in *du Pont, supra,* the *Lessig* rationale is clearly inappropriate.

The judgment in the instant case makes clear many of the ramifications of the *Lessig* rule. Even if the sole result of that unique Ninth Circuit rule were to subject businesses within the boundaries of the Ninth Circuit to a peculiar interpretation of federal law, *Lessig* should nonetheless be overturned. However, the unfortunate effects of the rule are much more pervasive.

V

THE LESSIG RULE IS APPLIED INCONSISTENTLY BY THE NINTH CIRCUIT

The purpose of Sherman Act Section 2 is to prevent attempts to acquire monopoly power, *i.e.,* power to control price and exclude competition. An interpretation of Section 2 that prohibits, as an "attempt," behavior which cannot result in monopoly power, makes no sense. Perhaps for this reason confusion has reigned even within the Ninth Circuit regarding the nature of the *Lessig* rule and its application. The doctrine has had a checkered history in the 20 years since its birth. Occasionally, panels simply overlook the rule and decide attempt cases without reference to *Lessig. See: A.L.W., Inc. v. United Airlines, Inc.,* 510 F.2d 52 (9th Cir. 1975); *Case-Swayne Co. v. Sunkist Growers,*

Inc., 369 F.2d 449, 454-59 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967); *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.*, 341 F.2d 653 (9th Cir. 1965), *cert. denied*, 382 U.S. 817, 86 S.Ct. 42, 15 L.Ed.2d 64 (1965). Some panels have apparently abandoned the rule—*Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 833 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972), 92 S.Ct. 715, 30 L.Ed.2d 740; *Bushie v. Stenocord*, 460 F.2d 116, 121 (9th Cir. 1972)—but not without criticism. *Hallmark Industry v. Reynolds Metal Company*, 489 F.2d 8, 12, n.3 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1973). However, even those cases acknowledging *Lessig* arrive at widely variant results.

For example, very recently in *M. A. P. Oil Co. v. Texaco*, 691 F.2d 1303 (9th Cir. 1983), the Ninth Circuit affirmed a defendant's judgment, *inter alia*, because of plaintiff's failure to establish "a substantial claim of restraint of trade, from which the specific intent required for an attempt claim could be inferred." 691 F.2d at 1309. While acknowledging *Lessig*, the court inconsistently held that some sort of market definition is essential if the concept of specific intent to monopolize is to have any meaning:

> "The *attempt element of specific intent to control prices or destroy competition cannot exist in a vacuum. Without some framework* within which the activities of competition and pricing take place, whether that framework be called a market or some other name, *Texaco could never have 'specific intent to control prices or destroy competition.'* This case is devoid even of that bare framework, and therefore we agree with the trial court's dismissal of plaintiffs' attempt claim."
>
> 691 F.2d at 1309, emphasis added.

In yet another recent case, a different Ninth Circuit panel used the confusion engendered by *Lessig* as the basis for avoiding its application:

> "Although this court has periodically stated that dangerous probability of successful monopolization is also an indispensable element [of attempt to monopolize], *e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir.) (as amended), *cert. denied* 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 61 (1982); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), cert. denied, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978), there is also Ninth Circuit authority for the view that probability of success is merely circumstantial evidence of intent. *E.g., Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982); *Blair Foods, Inc.*, 610 F.2d at 669; *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), cert. denied, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). We need not add further fuel to the controversy by adding our opinion regarding the inquiry's proper significance, because, as discussed below, there was sufficient evidence of McDonnell's probability of success to avoid summary judgment."
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> *Northrup Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 at 1057-1058 (9th Cir. 1983), footnote omitted.

Yet other panels have seemed resigned to accepting the *Lessig* rule without defending it. "Despite the substantial criticism of *Lessig*, it is still the law of [the Ninth] Circuit to which [each] panel is bound." *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977).

Out of this background of confusion, one thing is clear: the Ninth Circuit's continued acceptance of *Lessig* in some—albeit unpredictable—form, is exceedingly burdensome.

Lessig has caused costly expenditures of judicial resources in the Ninth Circuit. There is more—much more—attempted monopoly litigation in the Ninth Circuit than any other circuit. As Professor Handler has noted, the Ninth Circuit, by eliminating the dangerous probability element of Section 2 and thereby "encourag[ing] a greater number of . . . suits where evidence of market power is all but nonexistent . . . has written over thirty opinions on this one topic since *Lessig*, or more than one-third of all of the appeals reported on attempted monopolization during that time in all the circuit courts." *Handler & Steuer, Attempts To Monopolize And No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 174 (1980).

This explosion of attempted monopoly litigation is no coincidence. It is the inevitable result of the Ninth Circuit's confusing effort to use *Lessig* to convert Sherman Act Section 2 into an unfair business practices statute.

CONCLUSION

The time has clearly come to at last to put an end to the Ninth Circuit's aberrational *Lessig* rule. The rule has now been resoundingly rejected by all other circuits. It conflicts with this Court's requirement of dangerous probability of success. It subjects businesses within the boundaries of the Ninth Circuit to radically different application of the federal antitrust law. The rule itself is subject to radically different interpretations even by the Court which

gave it birth. It sweeps aside the causality requirement for imposition of antitrust liability and substitutes general business losses unconnected to prohibited antitrust conduct. For years, this has resulted in excessive and unnecessary litigation.

In the case at bar, for the first time, a final antitrust judgment of treble damages has been sustained solely on the basis of *Lessig*. By ignoring relevant market and dangerous probability of success, a catch-all award of damages has been allowed where the specific and appropriate measures of damages for the antitrust conduct found supports only a fraction, if any, of the damage award. This unjust result should not be permitted to stand.

Dated: May 21, 1984.

Respectfully submitted,

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(Appendices follow)

Appendix A

Jerry A. Blanton,
Plaintiff-Appellee/Cross-Appellant,

v.

Mobil Oil Corporation, a
corporation,
Defendant-Appellant/Cross-Appellee.

Roy H. Healey,
Plaintiff-Appellee/Cross-Appellant,

v.

Mobil Oil Corporation, a
corporation,
Defendant-Appellant/Cross-Appellee.
Nos. 82-3359, 82-3394.
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 6, 1983.
Decided Dec. 13, 1983.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, CHOY and NELSON, Circuit Judges.

CHOY, Circuit Judge:

Jerry Blanton and Roy "Bud" Healey, the plaintiffs below, are former operators and lessees of service stations located in Seattle and owned by defendant Mobil Oil Corporation. Blanton was a Mobil dealer from August 30, 1973, until October 8, 1976. Healey operated his Mobil station from February 19, 1974, until March 8, 1977. Both dealers

sued Mobil contending that during their respective tenures, Mobil damaged their businesses in violation of the Sherman Act, 15 U.S.C. §§ 1, 2, section 3 of the Clayton Act, 15 U.S.C. § 14, the Washington Consumer Protection Act, Wash.Rev.Code § 19.86.010 *et seq.*,[1] and the Washington Franchise Investment Protection Act ("FIPA"), Wash. Rev.Code § 19.100.010 *et seq.* They further alleged in diversity that their individual terminations as Mobil dealers involved fraud and breach of contract under Washington law.

After a lengthy trial, the jury returned special verdicts in favor of both plaintiffs. The jury found that Blanton had suffered $134,585 in antitrust damages and $94,628 in other damages. Healey was found to have sustained $19,967 in antitrust damages and $11,144 in other damages. By special verdict, the jury found that both Blanton and Healey had been subjected to unlawful tying arrangements, attempted monopolization, breach of contract, and fraud. The jury also found that Blanton had been a victim of coerced resale price maintenance and a group boycott aimed at his separate retail operations. Mobil's post-trial motions for judgment n.o.v. or new trial were denied. Mobil appeals the antitrust and contract/fraud awards.[2] Blanton and Healey cross- appeal the court's grant of a directed verdict in favor of Mobil on the FIPA claim.

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[1]Washington's Consumer Protection Act contains trade regulation that parallels the federal antitrust statutes. It expressly directs that its purpose is to "complement the body of federal law." Wash.Rev. Code § 19.86.920. *See State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 82 Wash.2d 265, 271, 510 P.2d 233, 238 (1973).

[2]Included in the single damages awards were small sums for minor claims sounding in contract that arose during the period prior to lease termination. On appeal, Mobil has not contested these smaller awards.

We affirm the antitrust judgment and reverse and remand both the contract/fraud judgment and the directed verdict on the FIPA claim.

I

FACTS

The prime focus of this case is on the methods used by Western Washington Mobil agents to sell motor oil and "TBA & S"—tires, batteries, accessories and specialties—to Mobil dealers who lease their stations from Mobil. This thread knits together almost all charges in this lawsuit, since both Blanton and Healey alleged that their leases were terminated because they refused to purchase Mobil automotive products. The plaintiffs presented substantial evidence that certain Mobil agents used their double role as landlords and salesmen to gain an illegal competitive advantage for Mobil products.

A. *Antitrust Claims*

1. *Tying Arrangements*

The jury found that Mobil had imposed an illegal tying arrangement on both Blanton and Healey, a violation of Clayton Act § 3 and a *per se* violation of Sherman Act § 1. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). Mobil motor oil and TBA & S were tied to the lease and gasoline supply contract. Clayton Act § 3 requires that both the tying and tied products be "goods, wares, merchandise, machinery, supplies, or other commodities. . . ." Gasoline as a tying product and motor oil and TBA & S as tied products fall within this definition. *See Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346, 352 (5th Cir.1965). A lease of real property, while

not covered by Clayton Act § 3, can be a tying product under Sherman Act § 1. *See Northern Pacific.*

Blanton and Healey each testified that they were threatened with termination of their dealerships unless they purchased Mobil motor oil and TBA & S. Blanton specifically testified that after he refused to make a large Mobil tire purchase, Mobil representatives made an inspection of his station and cited him for lease violations that included placement of trash in the trash enclosure, an unauthorized handle guard on the bathroom door that had been affixed to avoid vandalism, and damage to his personally owned desk. Mobil representatives confirmed the details of the inspection.

Other Western Washington Mobil dealers also testified that Mobil marketing representatives had threatened their leases in order to coerce purchases of Mobil products. George Peterson testified that the subject of his lease was raised when a Mobil representative attempted to sell him tires. Dick Page testified that Mobil's area manager asked him who was going to fill his gas tanks and maintain his station if he did not buy Mobil tires. Jimmy Scott was told that if he did not purchase Mobil products, Mobil might have to find a new station operator.

The pricing of Mobil products, particularly motor oil, supported the plaintiff's assertion that Mobil dealers were used as captive consumers of Mobil products. There was unrebutted testimony that Mobil sold its motor oil to dealers at a price substantially above that at which Mobil oil was sold at retail by Safeway grocery stores and independent distributors. In fact, one Seattle area dealer, who owned his station and was thus not subject to any tying arrange-

ment, testified that he found it economically preferable to drive across the Cascade Mountains to purchase Mobil motor oil from a distributor in Yakima than to purchase oil directly from Mobil in Seattle.

While Mobil representatives denied the existence of a tying arrangement, the district manager during the relevant period, Donald Hotsenpiller, did admit that purchases of oil and TBA & S were "considered" when Mobil decided whether to renew a station lease.

2. *Resale Price Maintenance*

Although it may not be self-evident that resale price maintenance in an effort to reduce prices would be an inevitably pernicious practice, it is well settled that maximum resale price fixing is a *per se* violation of the Sherman Act § 1. *Albrecht v. Herald Co.*, 390 U.S. 145, 151-54, 88 S.Ct. 869, 872-874, 19 L.Ed.2d 998 (1968). The jury found that Blanton had been coerced into lowering the price of his gasoline 5 or 6 cents per gallon during the last three months of 1974. Blanton's net profits fell during this period. Mobil had argued that the lower retail price was merely suggested, but the jury decided otherwise.

3. *Group Boycott*

The jury found that Blanton had been damaged by a group boycott as a result of coercion by Mobil. A group boycott, even one aimed against a single merchant, is a *per se* violation of the Sherman Act. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13, 79 S.Ct. 705, 709-10, 3 L.Ed.2d 741 (1959); *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1381 n. 3 (9th Cir. 1962), *vacated on other*

grounds, ... U.S. ....., 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983).

The evidence on this charge dealt with Mobil's attempts to discourage Mobil dealers from purchasing motor oil and TBA & S from Blanton. Blanton had been designated a "Key Dealer" for Mobil brand tires. In this capacity, Blanton was consigned Mobil tires which were to be available to local dealers on a fill-in basis. However, Blanton was not satisfied with that capacity. He determined that he could sell a range of Mobil products to Mobil dealers at prices below that available to the dealers direct from Mobil. This would be accomplished by purchasing Mobil products from independent distributors. Plaintiff Healey and three other Mobil dealers testified that they had been instructed by Mobil not to purchase Mobil products from Blanton. Mobil's Hotsenpiller stated at trial, "I think also maybe Jerry Blanton wanted to grow bigger than Mobil's policies and procedures would maybe want him to grow." R.T. 1879. Faced with a declining market for his distribution of Mobil products, Blanton abandoned his resale operation. Subsequent to termination of his dealership by Mobil, Blanton returned to selling motor oil and TBA & S from various producers, with considerable success.

4. *Other Anticompetitive Acts*

Plaintiffs also alleged that Mobil withheld performance of its obligations as landlord to coerce purchases of Mobil products and interfered with the advertising and promotional activities of Mobil dealers.

Several dealers testified that marketing representatives would raise the question of Mobil product purchases when

service station maintenance was sought from Mobil. One former marketing representative, James Stueck, testified that he would tell dealers that increased purchases of Mobil TBA & S could expedite station maintenance. Blanton testified that he was told that if Delco could sell him batteries, Delco could paint his station.

Dealers testified that Mobil representatives insisted they curtail advertising and promotion of non-Mobil products. Mobil also placed restraints on the use of advertising for Mobil products.

The jury found in Mobil's favor on the claim of monopolization under section 2 of the Sherman Act. However, the jury did conclude that Mobil had made an attempt to monopolize in violation of section 2 and aggregated all antitrust damages for each plaintiff under the attempt claim.

B. *Contract/Fraud Claims*

The leases that Blanton signed in 1973 and Healey signed in 1974 contained "evergreen clauses" providing for automatic renewals at current rental rates. However, the clauses had an exception, which stated that the lease "shall terminate at the end of any current period (original or renewal) by notice from either party to the other, given not less than 90 days prior to such termination." Blanton and Healey testified that they were told at the time of contract execution that the exception for unilateral termination would be exercised by Mobil only if Mobil had good cause to terminate. Moreover, their purchasing decisions as "independent businessmen" would not be considered in the renewal process. They further testified that they were told

that their leases would be renewed for a total term of 8 years, assuming good performance by the dealers. Evidence of these oral modifications was admitted under Washington's parol evidence rule.

The jury found that Mobil had breached its contracts with Blanton and Healey by refusing to renew their leases. It further found that Mobil had engaged in promissory fraud or fraudulent misrepresentations in connection with the refusal to renew. Blanton and Healey had argued that they were terminated because of their eventual decisions to scale down their purchases of Mobil products, even though they had been assured that their Mobil purchases would not be a consideration in the renewal process.

C. *Franchise Investment Protection Act (FIPA) Claim*

The Washington FIPA, Wash.Rev.Code § 19.100.010 *et seq.*, is a comprehensive scheme of franchise regulation that places specific obligations upon a franchisor and rights in a franchisee. *Laurence J. Gordon, Inc. v. Brandt, Inc.*, 554 F.Supp. 1144, 1159 (W.D.Wash.1983); *see generally* Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash.L.Rev. 291 (1973). The district court granted Mobil a directed verdict on this count, ruling from the bench, as a matter of law, that the FIPA was not meant to apply to situations such as were presented in this case.

II
ANTITRUST ISSUES

Mobil makes three arguments for reversal of the antitrust judgment. It argues (1) the special verdict is irreconcilably inconsistent; (2) the jury's relevant submarket finding is clearly erroneous and requires reversal of the attempted monopoly judgment; and (3) Blanton and

Healey failed to prove causal antitrust damages. We find none of these arguments persuasive.

A. *Jury Verdict*

In filling out the special verdict form, the jury entered $0 damages for each of the separate charges of tying arrangements, price fixing, group boycott, and other anticompetitive business practices, although the jury specifically found for the plaintiffs on each of these counts. Antitrust damages were only entered under the jury's finding that Mobil had attempted monopoly in violation of section 2 of the Sherman Act. However, below the amount entered in damages for attempted monopoly, the special verdict asked, "which damages are included in the figure set forth [as damages for attempted monopolization]?" In answer to this question, the jury listed all the antitrust counts which it had found in favor of the plaintiffs but had not assigned damages.

As Mobil concedes, "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962). Mobil argues that the jury findings cannot be resolved consistently because the damages awarded for attempted monopoly were, in Mobil's terms, "exactly the same" as the damages suffered by the plaintiffs from all the component antitrust violations for which $0 damages were specifically awarded. Mobil might have a point if the jury did not specifically indicate that damages for all the component antitrust violations were included in the amount awarded for attempted monopoly. The jury was specifically instructed that "[a] plaintiff cannot recover twice for the same injury,

even though he may have two or more theories. Whatever injury a party suffered may only be compensated once." Instruction No. 39. In light of this instruction, the jury's decision to aggregate all damages under the overreaching attempt violation is not only reconcilable, but sensible.

B. *Relevant Market*[3]

The jury found that Mobil had attempted to monopolize a relevant submarket consisting of sales of "Mobil-branded and non-Mobil-branded oil, lubricants, and TBA & S to Mobil dealers." Mobil apparently contends that this relevant market, as found by the jury, is clearly erroneous.[4] The question whether a particular relevant market does or does not exist is one of fact, and a jury's finding of a relevant market cannot be disturbed unless it is clearly erroneous. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299 (9th Cir.), *cert. denied*, ... U.S.

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[3]This discussion pertains only to the finding of attempted monopoly.

[4]Mobil actually argues that the jury found an erroneous submarket consisting of "Mobil-branded and Mobil-brokered" automotive products. If this submarket really had been found, Mobil's cause may have been aided by the common rule that a manufacturer has a natural monopoly over his own products, and does not violate the antitrust laws unless he uses the natural monopoly to gain control of the market in which his product competes. *See Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972). While it is true that Blanton and Healey desired a jury instruction on a submarket consisting of Mobil branded and brokered products, the trial court ultimately declined to give that instruction. The relevant submarket referred to in the jury instructions and the jury's special interrogatories appears as stated in text above. Blanton and Healey's answering brief noted this error in Mobil's argument, yet Mobil renewed the same relevant market description in its reply brief. We admit to some puzzlement over Mobil's persistent mischaracterization of the jury verdict.

....., 103 S.Ct. 364, 74 L.Ed.2d 400 (1982). Since Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding, we are apparently asked to rule as a matter of law that a relevant submarket cannot consist of sales to dealers licensed by a common oil company.

We need not resolve the legal question presented by Mobil because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964), and its progeny. In *Lessig*, we stated:

> When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is "not in issue." *United States v. E.I. Du Pont & Co.*, 351 U.S. 377, 395 n. 23, 76 S.Ct. 994 [1007 n. 23], 100 L.Ed. 1264 (1956). Section 2 prohibits attempts to monopolize "any part" of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products.

Id. at 474-75 (footnotes omitted).

Despite the sweeping language of *Lessig*, however, it is clear that we do require a showing of a relevant market in circumstances where the conduct of the attempted monopolizer is ambiguous or not clearly predatory. The current statement of the *Lessig* doctrine is found in *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979), where we stated that "in the absence of proof of relevant

market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of § 1 to prove an attempt to monopolize." *Id.* at 390 (footnote omitted). *Accord M.A.P. Oil Co. v. Texaco, Inc.*, 691 F.2d 1303, 1309 (9th Cir.1982); *see William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1029 nn. 9 & 11 (9th Cir.1981), *cert. denied*, ... U.S. ....., 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

Under the modified *Lessig* doctrine, Blanton and Healey have clearly sustained their burden of proof regardless of the correctness of the jury's relevant market finding. The jury specifically found that Mobil engaged in *per se* violations of § 1 of the Sherman Act in its promotion of sales of motor oil and TBA & S. Although the *Lessig* doctrine has been subject to criticism, it is the law of this circuit, and we are bound to follow it. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 (9th Cir.1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability.

Mobil acknowledges that the present case falls within the reach of the *Lessig* doctrine. Indeed, the present case is almost identical on its facts to *Lessig*. Here, as in *Lessig*, the defendant is an oil company accused of using clearly anticompetitive and illegal methods to promote sales of automotive products to its branded service stations. Mobil argues that we should not rely on *Lessig* to uphold the jury verdict because the jury was allowed to find a relevant market, and in fact did identify a relevant submarket. This,

Mobil argues, amounts to abandonment of *Lessig* as a ground for sustaining the jury verdict.

Mobil fails to realize that it is necessary to instruct the jury on relevant market in the event there is no finding of predatory conduct or *per se* violations of the Sherman Act. In the absence of predatory conduct or *per se* violations, an antitrust defendant may still be found liable for attempted monopoly, but only if the antitrust plaintiff can establish a relevant market as a framework for evaluating behavior that does not rise to the level of a substantial restraint of trade. *M.A.P. Oil*, 691 F.2d at 1309. In such a case, a relevant market is needed to evaluate the defendant's market behavior, and thus to determine whether the defendant had the attempt element of "specific intent to control prices or destroy competition." *Id.* In this case, Blanton and Healey needed to instruct the jury on relevant market in the event that the jury found for Mobil on their claims that Mobil committed *per se* violations of the antitrust laws. However, in the presence of *per se* violations, specific anticompetitive intent may be inferred. *Inglis*, 668 F.2d at 1027-28; *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 736-37 (9th Cir.1979).

Further proof that Blanton and Healey did not abandon *Lessig* as precedent for finding Mobil liable for attempted monopolization is shown by their proposed jury instruction No. 20. This instruction relied on the *Lessig* doctrine as a ground for establishing liability on the attempt count, stating that specific intent to monopolize may be inferred from *per se* acts in violation of the Sherman Act. Moreover, the trial court relied on the *Lessig* progeny case of *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926

(9th Cir.1980), *cert. denied,* 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981), to deny Mobil's post-trial motion for judgment n.o.v. There is no unfairness to Mobil in sustaining the jury verdict on the basis of *Lessig,* which, after all, has been the law of this court for almost twenty years.

C. *Causal Antitrust Injury*

Mobil argues that the antitrust judgment must be reversed because Blanton and Healey failed to establish causal antitrust injury as a result of Mobil's anti-competitive acts. Causal antitrust injury is an essential element of an attempted monopoly claim. *California Computer Products, Inc. v. IBM Corp.,* 613 F.2d 727, 736, 738 (9th Cir. 1979).

To establish causal antitrust injury, "the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 392 (9th Cir.), *cert. denied,* 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). *Accord Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1205-06 (9th Cir. 1975), *cert. denied,* 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976). We review a trial court's determination that a plaintiff has suffered causal antitrust injury under the "clearly erroneous" standard. *Reid Brothers Logging Co. v. Ketchikan Pulp Co.,* 699 F.2d 1292, 1299 (9th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 280, 77 L.Ed.2d ..... (1983); *see Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 122-23, 89 S.Ct. 1562, 1575-76, 23 L.Ed.2d 129 (1969).

There is substantial evidence that Blanton and Healey were harmed by Mobil's antitrust violations. Undisputed

evidence indicated that the Mobil motor oil that the plaintiffs were coerced into purchasing directly from Mobil was priced substantially higher than Mobil motor oil that was available from independent distributors, including Safeway. Proof in support of Blanton's group boycott claims included direct testimony by Mobil dealers that they would have purchased supplies from Blanton had they not been coerced by Mobil to cease purchases from Blanton. Both plaintiffs' evidence on the damages resulting from Mobil's interference with their advertising was sufficient to raise a jury question of whether the dealers lost anticipated income because of Mobil's actions. There is more than sufficient evidence to support the jury's finding of causal antitrust liability.

Mobil argues that the jury could have found that Blanton and Healey suffered losses from sources other than Mobil's illegal conduct. In this regard, Mobil introduced evidence that the dealers faced losses from road construction, lawful competition, and other external causes. The jury was properly instructed:

> If you find that plaintiffs were injured by these causes, and that the alleged antitrust violations, if proven, were not a substantial factor in causing the injury, plaintiffs' injury would not have been proximately caused by the alleged conduct, and your verdict would have to be in favor of the defendants.

Instruction No. 39. This instruction is fully consistent with our holding in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014 (9th Cir.1981), *cert. denied,* .... U.S. ...., 103 S.Ct. 57, 74 L.Ed.2d 61 (1982), that a defendant's antitrust violations need only be "a material cause" of a business decline. *Id.* at 1051. There is sub-

stantial evidence to support the jury's conclusion that Mobil's anticompetitive actions were a material factor in Blanton and Healey's relative lack of business success.

Perhaps Mobil's arguments are directed at the amount of damages, rather than the fact of damages. So construed, Mobil's arguments are still unavailing. The required quantum of proof necessary to prove the amount of damages is less than that required to prove the fact of damages. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1341 n. 7 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3873 (U.S. May 27, 1983) (No. 82-1938); *Flintkote*, 246 F.2d at 392. This lesser quantum of proof has been described as that sufficient to support a "'just and reasonable estimate of the damage,'" *Pacific Coast Agricultural*, 526 F.2d at 1207 (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946). Generally, we will not reverse the jury's assessment of the amount of damages unless the amount is "grossly excessive or monstrous," *Siebrand v. Gossnell*, 234 F.2d 81, 94 (9th Cir. 1956); *accord Barzelis v. Kulikowski*, 418 F.2d 869, 870 (9th Cir. 1969), or unless the evidence clearly does not support the damage award. *City of Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1039 (9th Cir.1983). A damage award also cannot stand if it "could only have been based on speculation or guesswork." *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1263 (9th Cir.1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982); *see Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946).

In this case, the plaintiffs presented substantial evidence of losses caused by concrete acts of Mobil, particularly the

tying arrangements and group boycott of Blanton. The plaintiffs presented additional evidence comparing profitability from their subsequent service station operations as lessees of another oil company. Evidence was introduced showing that the subsequent unrestrained operations were similar to the restrained operations by reason of station location, station facilities, and gasoline gallonage pumped. This "before and after" evidence, comparing a plaintiff's restrained business with a comparable business operating free of antitrust restraints, is competent evidence of antitrust damages. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 266, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 378-79, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927); *Pacific Coast Agricultural*, 526 F.2d at 1206-07. Blanton and Healey have presented evidence sufficient to justify the amount of antitrust damages awarded by the jury.

III

CONTRACT/FRAUD ISSUES

The jury awarded Blanton and Healey damages for Mobil's termination of their leases under two independent legal theories—breach of contract and fraud. Mobil attacks the award for breach of contract on two grounds. First, Mobil argues, the award is tainted because the trial court improperly allowed the introduction of parol evidence. Second, the damages awarded by the jury failed to account properly for amounts earned by Blanton and Healey in mitigation of their damages. Blanton and Healey respond that the possible infirmity in the contract award is irrelevant in light of the jury's finding that fraud constitutes an independent basis for the award. Mobil answers this de-

fense by asserting that the evidence cannot support a finding of fraud or fraudulent misrepresentation on the part of Mobil.

We are convinced that Mobil is correct in asserting that the jury improperly failed to consider Blanton and Healey's mitigated damages. Although we agree with Blanton and Healey that there is sufficient evidence to support the jury's finding of fraudulent misrepresentation, the fraud finding cannot sustain the judgment either. As discussed below, under Washington law, there is no liability for fraud unless there is "consequent damage" from the fraud. Thus, should it turn out that the plaintiffs' damages from the fraud were totally mitigated, the fraud finding could not stand. Accordingly, we must reverse and remand the jury's damage findings on Blanton and Healey's termination claims for a consideration of mitigated damages. However, since any damages found on remand could be sustained on the fraud count, it is unnecessary to address Mobil's argument regarding the improper introduction of parol evidence.

A. *Contract Damages*

After Blanton and Healey were terminated by Mobil, they operated, with considerable success, a service station leased from another oil company. In order to account properly for the plaintiffs' mitigation of damages, the jury was given a special verdict form designed to allow for simple computation of damages. For each plaintiff, the jury was asked first, "What income would the plaintiff have received for each of the 8 years of the breached renewal contract?" Second, the jury was asked, "How much income did the plaintiff actually receive during each of the eight years?"

The second question was answered as expected. However, the jury did not interpret the first question in the way anticipated. All parties agree as to how the jury *did* interpret the question. For the first question, the jury entered each plaintiff's *mitigated damages,* rather than *income,* for each year in question. However, in those years where mitigating income exceeded contract damages, the jury simply entered "0." This interpretation led the jury to enter damage figures for the first 3 years of the contract period and zeroes for the last 5 years. Blanton and Healey concede that after the third year of the breached contract, their actual income exceeded the projected income from the breached contract with Mobil. Thus, under the jury's interpretation of the first question, the last 5 years of the contract term should not have been characterized as years in which the plaintiffs' damages equaled their income in mitigation. Rather, during these last 5 years, under the jury's reading of the special interrogatory, negative totals should have been entered.

We agree with Mobil that the mitigating income over the full life of the contract must be used to offset damages from the breach. Having asked the jury to compute damages over an 8-year contract period, Blanton and Healey cannot ignore the mitigating income over that full period. Blanton and Healey argue that the contract can be divided into discrete periods of 1 year, and that mitigated damages for any one period is recoverable, even if there is no net injury over the life of the contract. We cannot accept this novel statement of law.

It is a hornbook rule that the purpose of compensatory damages is "to put the injured party in as good a position

as he would have been put by *full* performance of the contract . . . ." 5 A. Corbin, *Corbin on Contracts* § 1002, at 31 (1964) (emphasis added). *See* 11 S. Williston, *A Treatise of the Law of Contracts,* § 1338 (W. Jaeger 3d ed. 1968). Washington law is in full agreement. *Prier v. Refrigeration Engineering Co.,* 74 Wash.2d 25, 30, 442 P.2d 621, 624 (1968). A natural corollary of this rule is that a contract plaintiff is not entitled to receive damages in excess of what he or she would have received if the defendant had fulfilled the breached contract. *Platts v. Arney,* 50 Wash.2d 42, 46, 309 P.2d 372, 375 (1957). Full mitigation must be offset against full damages over the life of the contract to put Blanton and Healey in the position they would have been in had Mobil performed its promise to renew their leases for 8 years.

It is thus necessary to remand the contract judgments for a calculation of fully mitigated damages. It seems likely that Blanton and Healey earned more by leaving Mobil than they would have earned as Mobil lessees. The record, though, does not "permit[] only one resolution of the factual issue," so a remand on damages is required. *Pullman-Standard v. Swint,* 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982).

B. *Fraud*

The jury found as an alternate ground for awarding termination damages that Mobil had fraudulently misrepresented its intent to renew Blanton and Healey's leases regardless of whether they purchased Mobil products. We first consider whether there is evidence sufficient to support a finding of fraud, because in the absence of such evidence, we would be required to determine whether any termination

damages at all can be awarded in light of Mobil's assertions regarding parol evidence of contract terms. Our affirmative answer to this first question requires an examination of whether our mitigation finding on contract damages applies to damages for fraud.

1. *Sufficiency of the Evidence*

Mobil argues that the record does not support a finding of fraud because there is no evidence that Mobil had a specific intention not to perform its promise to renew Blanton and Healey's leases at the time the original leases were signed. Under Washington law, promissory fraud only exists when a promise is made with "a present intent not to attempt the future fulfillment of the promise[ ]." *Fruit Industries Research Foundation v. National Cash Register Co.,* 406 F.2d 546, 550 (9th Cir.1969); *see Markov v. ABC Transfer & Storage Co.,* 76 Wash.2d 388, 396, 457 P.2d 535, 539 (1969). Mobil argues that there is no evidence that it had any intention not to renew Blanton and Healey's leases when it entered into the original leases.

Mobil misconstrues Blanton and Healey's fraud case. Blanton and Healey argued that Mobil asserted that they could be "independent businessmen," buying and selling automotive products from and to whomever they chose, without jeopardizing their leases. They further argued that Mobil had no intention to fulfill this promise, but rather intended to terminate the leases unless the dealers adhered to the "Mobil plan" and made substantial purchases of Mobil motor oil and TBA & S. The evidence was sufficient to support the jury's verdict that Mobil did not intend to renew Blanton and Healey's leases if the dealers did not make substantial purchases of Mobil products.

2. *Fraud Damages*

Although the discussion of mitigated damages in Part III-A, *supra*, was made in the specific context of contract law, the same analysis applies, *mutatis mutandis*, to fraud damages. It is an essential element of a claim of fraud under Washington law that the plaintiff suffer consequent damage from the fraud. *A.B.C. Packard, Inc. v. General Motors Corp.*, 275 F.2d 63, 71 (9th Cir.1960); *Markov v. ABC Transfer & Storage Co.*, 76 Wash.2d 388, 395, 457 P.2d 535, 539 (1969); *Webster v. L. Romano Engineering Corp.*, 178 Wash. 118, 121, 34 P.2d 428, 430 (1934). Failure to prove this essential element is fatal to a fraud claim. *Markov*, 76 Wash.2d at 395, 457 P.2d at 539; *Puget Sound National Bank v. McMahon*, 53 Wash.2d 51, 54, 330 P.2d 559, 561 (1958). If Blanton and Healey gained a net benefit from Mobil's fraud by gaining the opportunity to enter into more advantageous business arrangements, their fraud claim would necessarily fail for lack of consequent damages. The jury's failure to consider Blanton and Healey's full mitigated damages thus requires a remand on the fraud count as well.

IV

FIPA DIRECTED VERDICT

Washington's FIPA has been called the most comprehensive franchise statute of its kind. Annot., 67 A.L.R.3d 1299, 1302-03 (1975). Its regulatory scheme comes into play only if two requirements are met: "(1) the agreement between the parties includes a license to the franchisee to use a trademark or 'related characteristic' of the franchisor, and (2) the franchisee pays a 'franchise fee.'" *American Oil Co. v. Columbia Oil Co.*, 88 Wash.2d 835, 840, 567 P.2d

637, 640 (1977); *see* Wash.Rev.Code § 19.100.010(4). The district court did not issue a memorandum discussing its reasons for directing a verdict for Mobil on the FIPA count. However, in its motion for a directed verdict, Mobil made essentially two arguments. First, it argued that service station agreements are not within the ambit of the statute. Second, it argued that even assuming service stations are covered by the FIPA, Blanton and Healey did not pay a "franchise fee" within the meaning of the statute.

In our review of the directed verdict below, we are "bound to view the evidence in the light most favorable to [the nonmoving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962) (footnote omitted). *Accord Greyhound Computer Corp. v. International Business Machines Corp*, 559 F.2d 488, 492 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). To the extent the directed verdict depends on an interpretation of state law, we normally give deference to the interpretation of the district judge. *Feldman v. Sirrine Industries, Inc.*, 679 F.2d 1299, 1306 (9th Cir.1982). However, here the district court gave no basis for its interpretation. We are convinced that (1) any interpretation of the FIPA that would include a blanket exception for service stations would be clearly wrong; and (2) there is substantial evidence to support Blanton and Healey's assertion that a franchise fee was paid to Mobil.

A. *Service Station Exemption*

The FIPA does allow for certain exemptions from its coverage. The only businesses fully exempted from the

statute are motor vehicle dealer franchises. Wash.Rev. Code § 19.100.010(4)(c). Additionally, certain credit and insurance transactions do not come under the provisions of the FIPA. *Id.* § 19.100.010(4)(a)-(b). The FIPA grants no exemption, by its terms, to gasoline service stations.

Mobil argues that an exemption for service stations was created by the *American Oil* case. In that case, plaintiff Columbia claimed that it was in a franchise relationship with defendant American because it had purchased "tires, batteries, accessories and fuel oils" from American. Columbia further argued that a franchise fee was paid in the form of a rental of signs and credit card imprinters from American. 88 Wash.2d at 841, 567 P.2d at 641. The court ruled that these purchases did not establish a franchise with American. The court's explanation for this ruling was not that service stations were exempt from the FIPA. Rather, the court stated, "These purchases and rental charges are specifically excluded from the definition of a 'franchise fee.' Consequently, there was no payment of a 'franchise fee' by Columbia to American." *Id.* (citation omitted).

The court cited for this holding Wash.Rev.Code § 19.100.010(11)(a), (e), which gives two exceptions to the general definition of a franchise fee. These exceptions are:

> (a) the purchase or agreement to purchase goods at a bona fide wholesale price; . . . (e) the purchase or lease or agreement to purchase or lease supplies or fixtures necessary to enter into the business or to continue the business under the franchise agreement at their fair market or rental value . . .

Columbia never alleged that its purchases or rentals from American were at any price other than the bona fide wholesale price. Thus, Columbia plainly had not paid a franchise fee within the meaning of the statute, and could not gain the protection of the FIPA. There is no holding in *American Oil* that service stations are exempt from the FIPA regardless of the payment of a franchise fee.

Mobil argues that a footnote in *American Oil* compels a different conclusion. In that footnote, the court stated:

> Of particular interest is the fact that S.B. 2313, presently pending before the legislature of the State of Washington, would amend the Franchise Investment Protection Act to apply to agreements granting service station dealers the right to sell gasoline under the supplier's trademark. This proposed legislation reinforces our view that the franchise act, as presently enacted, does not apply to jobber sales contracts between oil companies and private corporations.

88 Wash.2d at 841 n. 4, 567 P.2d at 641 n. 4.

We have examined that proposed legislation, as well as an earlier bill to the same effect, S. 2145, 44th Reg.Sess. (Wash.1975), and neither bill supports the conclusion that the unamended statute has a service station exemption. Rather, each bill would include service stations within the FIPA's coverage regardless of whether a franchise fee was paid to the franchisor. The footnote is thus support for the proposition that service station operators making bona fide purchases from oil companies cannot claim protection under the FIPA unless they have paid a franchise fee.

B. *Franchise Fee*

This brings us to the question of whether Blanton and Healey have presented substantial evidence that they paid Mobil a franchise fee. The FIPA first defines "franchise fee" generally, and then enumerates exceptions. The general definition is:

> "Franchise fee" means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales whether or not referred to as royalty fees, *any payment for the mandatory purchase of goods or services* or any payment for goods or services available only from the franchisor, or any training fees or training school fees or charges
> . . . .

Wash.Rev.Code § 19.100.010(11) (emphasis added). Blanton and Healey argue that their mandatory purchases of tied motor oil and TBA & S come squarely within the statutory language. Furthermore, the tied purchases are not excepted from the general definition as purchases at a bona fide retail or wholesale price, *id.* § 19.100.010(11)(a)-(b), (d)-(e), because the purchase price involved overcharges as part of the effects of the tying agreement.

We agree that Blanton and Healey have presented substantial evidence that they have paid a franchise fee. The concept of mandatory purchase is implicit in the concept of an illegal tying arrangement under the antitrust laws. It is irrelevant that a forced overcharge is not specifically denominated a franchise fee. Professor Chisum, in his

exhaustive analysis of the FIPA, states that the FIPA is intended to reach "franchisors who might attempt to extract a hidden fee in the form of overcharges for property sold to the franchisee." Chisum, *State Regulation of Franchising: The Washington Experience,* 48 Wash.L.Rev. 291, 343 (1973). Washington decisional law is in accord with Professor Chisum, one court holding that the term "franchise fee" includes "fees hidden in the franchisor's charges for goods or services." *Lobdell v. Sugar 'N Spice, Inc.,* 33 Wash.App. 881, 892, 658 P.2d 1267, 1278 (1983). Since Blanton and Healey presented substantial evidence that they paid a franchise fee, the directed verdict in favor of Mobil on the FIPA claim must be reversed.

V

CONCLUSION

The antitrust judgments in favor of Blanton and Healey are AFFIRMED.

The contract/fraud judgments in favor of Blanton and Healey are REVERSED and REMANDED for further consideration of mitigated damages.

The FIPA directed verdict in favor of Mobil is REVERSED and REMANDED for further proceedings consistent with that Act.

Blanton and Healey are entitled to reasonable attorney's fees for the antitrust portion of this appeal. Upon presentation of appropriate documentation, this court will determine such fees.

Parties shall bear their own costs on this appeal.

Appendix B

Mobil Oil Corporation is a wholly owned subsidiary of Mobil Corporation which is publicly held. Listed below are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation, and their affiliates and subsidiaries which are or may be publicly held. For purposes of this list only companies in which a five percent (5%) or greater interest is held are considered.

NAME OF COMPANY

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (Blasbjerg) Limited
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Arabian Shipping & Trading Company S.A.

Arabian Trading Company S.A.
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS-Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bin Sulaiman Mobil Towers
Bayerische Mineral Industrie A.G.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Braamkey Investments (Proprietary) Limited
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.

Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Colombia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers—C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania Colombiana De Forestacion S. A.
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructura Calla 67, Limitada
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP

Corrugadora de Carton, S. A.
C.R.C. Lyon Chauffage
CRCP
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
Dearborn Land Company
De. Ba.—Industria Petrolifero
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
East Texas Salt Water Disposal Company
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG

Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Establissements Nicol and Cie
Ets. La Goff
Ets. R. Saillard
Etablissements Wagner
Faavang Autoverksted A/S
FACEL
Fairwind Maritime Company, S.A.
Felix Oil Company
Fibil, S.A.
Fibras Internacionales de Puerto Rico, Inc.
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
First Eastleigh No. 163 (Proprietary) Limited
Fountain Garage (East Park) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Stirchley) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser Mineraloelhandels GmbH & Co. KG
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin

Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
H. van der Heijden Service Stations B.V.
Heizoal-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Inmunizadoras Unidas, S. A.
Industria De Carbon Del Valle Cauca, S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K. D. Keysers Investments (Proprietary) Limited
K.K. Sankyo Plastics
K.K. Toresen
Kanto Kygnus Sekiyu Hambai K.K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha

Keihin Kygnus Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Likit Petrol Gazi ve Yakit Ticaret A.S.
Loba Chemie Gesellschaft mbh
Lubricantes del Sur, S.A.
Marceaux & Cie
Mateo Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. (Mobil Chimie Belge S.A.)
Mobil Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire

Mobil Oil Dahomey
Mobil Oil de Mexico, Sociedad Anonima
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.

New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited

Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pipe Line Banal de La Goulette
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Prespak (Proprietary) Limited
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S. A. Ets. George DUBOIS
S. A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited

Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Alfred Ott & Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers

Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanie (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (REM)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Etablissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-European
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Jean Roussel S. A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers

Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.

Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Walton, Gatwick Pipeline Company Limited
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
WSG, Warmeservice Gmbh
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres